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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

16 JAMES GROSS, individually and on behalf of
all others similarly situated,

Case No. 3:12-cv-00154-CRB

**PLAINTIFF'S MOTION FOR AND
MEMORANDUM IN SUPPORT OF
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: October 4, 2013
Time: 10:00 a.m.
Location: Courtroom 6, 17th Floor
Judge: Honorable Charles R. Brever

19 SYMANTEC CORPORATION, a Delaware
20 corporation, and PC TOOLS, LTD., an Irish
limited company.

Defendants

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 **PLEASE TAKE NOTICE** that on October 4, 2013 at 10:00 a.m., or as soon thereafter as
3 counsel may be heard, Plaintiff James Gross will appear for a final Fairness Hearing, through
4 counsel, before the Honorable Charles R. Breyer, or any judge sitting in his stead, in Courtroom 6,
5 17th Floor, of the United States District Court for the Northern District of California, located at 450
6 Golden Gate Avenue, San Francisco, California 94102, and then and there move the Court for an
7 Order (i) granting final approval of the Parties' class action settlement, (ii) dismissing Plaintiff's
8 Second Amended Complaint with prejudice and releasing any and all Released Claims as provided
9 in the Parties' Stipulation of Class Action Settlement, and (iii) granting such other and further relief
10 as the Court deems reasonable and just.

11 Plaintiff's Motion is based on this Notice of Motion, the authorities cited in the attached
12 Memorandum in Support, oral argument of counsel, all of the documents in the record in this matter,
13 and any other matter that may be submitted or raised at the Fairness Hearing on the Motion.

Respectfully submitted,

JAMES GROSS, individually and on behalf of all others similarly situated,

Dated: September 6, 2013

By: /s/ Rafey S. Balabanian
One of Plaintiff's Attorneys

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14	<i>Drymon, et al. v. Cyberdefender Corp.</i> , No. 11-CH-16779 (Cir. Ct. Cook County, Ill. May 6, 2011)	1 n.2, 14 n.18
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Miscellaneous:

16	28 U.S.C. § 1715	19
17	Fed. R. Civ. P. 23	9
18	<i>Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide</i> (2010) available at http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\$file/NotCheck.pdf	9, 10 n.15
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1 **I. INTRODUCTION**

2 The class action settlement reached in this case is an absolute success for the Settlement
 3 Class.¹ It provides for the opportunity to obtain complete monetary relief, valuable in-kind
 4 benefits, and requires modifications to the Software Products at issue, bringing their functional
 5 mechanisms and disclosures in line with Class member expectations. These results are consistent
 6 with (or stronger) than the benefits obtained through other settlements with Defendants' industry
 7 competitors² and ultimately, support a final determination that the settlement is fair, reasonable
 8 and adequate. Setting aside the settlement's substantive terms, the Parties' path to resolution also
 9 weighs in favor of granting final approval. Indeed, the settlement is the result of more than a
 10 year's worth of litigation, discovery, informal discussions and informational exchanges, and two
 11 private mediations presided over by one former judge and another well-respected neutral with
 12 decades of experience resolving complex class actions like this one.

13 Now, in accordance with the Court's Preliminary Approval Order, the Parties, with the
 14 assistance of Settlement Administrator Epiq Systems, have fully implemented the Court-approved
 15 Notice Plan, which included (i) direct e-mail notice that reached more than 83% of the Settlement
 16

17 ¹ Unless otherwise stated herein, capitalized terms shall have the same meaning as set forth
 18 in the Parties' Stipulation of Class Action Settlement (the "Agreement"), attached as Exhibit 1.

19 ² The settlements reached with Defendants' industry competitors and finally approved are as
 20 follows: (i) *Ledet v. Ascentive LLC*, No. 2:11-CV-295-PBT (E.D. Pa. Jan. 18, 2011) (creating a
 21 \$9.6 million settlement fund from which class members could make a claim for either \$10.00 or
 22 \$18.00 depending on the type of software purchased, and prospective relief prohibiting defendant
 23 from overstating the severity of errors and requiring additional disclosures to consumers about the
 24 nature of the software); (ii) *Drymon, et al. v. Cyberdefender Corp.*, No. 11-CH-16779 (Cir. Ct.
 25 Cook County, Ill. May 6, 2011) (creating a \$9.75 million settlement fund from which class
 26 members could make a claim for \$10.00 for each software product purchased, and prospective
 27 relief requiring defendant to provide consumers with enhanced disclosures regarding the
 28 functionality and methodology of the software products at issue, as well as certain changes to the
 software itself); (iii) *Webb, et al. v. Cleverbridge, Inc., et al.*, No. 1:11-cv-04141 (N.D. Ill. June
 17, 2011) (creating a \$4 million settlement fund from which class members could make a claim
 for \$8.50, and prospective relief requiring clear disclosure of any automatic renewal, information
 about the renewal dates and charges, and a simple method of cancelling future renewal charges);
 and (iv) *LaGarde, et al. v. Support.com, et al.*, No. 3:12-cv-00609-JSC, Dkts. 58, 61 (N.D. Cal.
 2013) (creating an \$8.59 million settlement fund from which class members could make a claim
 for \$10, prospective relief requiring defendants to provide consumers with enhanced disclosures
 regarding the functionality and methodology of the software products at issue, making certain
 changes to the software itself, and providing three months free access to anti-virus software).

1 Class, (ii) the publication of a Settlement Website, which allowed Class members to submit claims
 2 online or download Claim Forms to submit by mail and review all relevant Court documents, and
 3 (iii) CAFA notice to the U.S. Attorney General and other relevant governmental agencies.³ The
 4 deadline to submit requests for exclusion and to file objections has now passed and the response
 5 from the Settlement Class has been overwhelmingly positive—not a single objection to the
 6 settlement has been raised, just six (6) Class members have requested to be excluded, and nearly
 7 two thousand claims for monetary relief have been made (with still more expected).

8 The Class's reaction to the settlement doesn't come as a surprise given that, under the
 9 terms of the settlement, Defendants have agreed to modify the Software Products so that they
 10 more accurately identify the functions they perform and the discrete errors detected and repaired
 11 on users' computers. Further, Defendants have agreed to include within the Software additional
 12 disclosures about its overall functionality, including explanations of the methodologies used in
 13 scanning and repairing users' computers, the types of errors and other problems the Software is
 14 capable of detecting, reporting and repairing, and the actual threat those issues pose to users'
 15 machines.

16 Additionally and setting this settlement apart from many of the other class action
 17 settlements reached with Defendants' industry partners—most recently in the cases of *Ledet v.*
 18 *Ascentive LLC*, No. 2:11-CV-295-PBT (E.D. Pa.) and *Webb, et al. v. Cleverbridge, Inc., et al.*, No.
 19 1:11-cv-04141 (N.D. Ill.)—Defendants will automatically provide three months of free access to
 20 Symantec's award-winning Norton Antivirus software to each member of the Settlement Class
 21 regardless of whether they make a claim for any other Settlement Benefits. All told, this in-kind
 22 benefit represents an additional \$6-\$12 value to each Class member and more than \$6-\$12 million
 23 to the Class as a whole.

24 Finally, the settlement allows Settlement Class members to claim \$9.00 for their purchase
 25

26 ³ It is noteworthy that notice was sent to the appropriate officials of each state, as well as the
 27 Attorney General of the United States, and not a single concern about or objection to the
 28 settlement was raised. To be clear, this is not to say that the Attorney General or state officials
 have necessarily signed-off on the settlement, but as described further herein, the complete lack of
 opposition certainly informs the discussion of its fairness, reasonableness and adequacy.

1 of the Software Products, which represents a near complete recovery of the amounts they overpaid
 2 for the Software. The settlement also accounts for additional monetary relief in the form of
 3 payments for notice and claims administration expenses, attorneys' fees and costs, an incentive
 4 award to Plaintiff as Class Representative, and any *cypres* distribution the Court may award.

5 In the end, the relief provided under the settlement, when considered with the arms'-length
 6 negotiations that led to it and the positive response from the Settlement Class, demonstrates that
 7 the settlement is fair, reasonable and adequate, and warrants final approval by the Court. For these
 8 reasons, and as discussed further below, Plaintiff respectfully requests that the Court grant the
 9 instant motion and dismiss all Released Claims with prejudice.⁴

10 **II. FACTUAL BACKGROUND**

11 **A. Plaintiff Gross Alleges that Defendants Deceptively Designed and Marketed
 12 Their Software Products.**

13 On August 14, 2012, Plaintiff Gross filed his Second Amended Complaint (the
 14 "Complaint") in this Court. (Dkt. 50, cited herein as "Compl.") In his Complaint, Gross alleges
 15 that Defendants deceptively designed and marketed their PC Tools Registry Mechanic, PC Tools
 16 Performance Toolkit, and Norton Utilities software (collectively the "Software Products," the
 17 "Software," or the "Products") such that the Products are incapable of providing all of the
 18 functions advertised. (Compl. ¶¶ 2-4, 40-42, 48-52, 96.)⁵ Plaintiff alleges further that consumers
 19 were induced to purchase the Software as a result of Defendants' urging them to perform
 20 "diagnostic" scans with free versions of the Software that would supposedly detect and report any
 21 errors or problems afflicting their computers. (*Id.* ¶¶ 3, 44-45.) The Software, however, would
 22 inevitably report that various errors existed on users' machines and that in order to fix them, users
 23 had to purchase full versions of the Software at an average cost of approximately \$30. (*Id.*)

24
 25
 26 ⁴ A proposed Final Judgment Order is attached as Exhibit 2.

27 ⁵ Although different in name, the Software Products, which have many similarities in
 28 function and in the way Defendants marketed them, are referred to collectively throughout
 Plaintiff's Second Amended Complaint and the instant motion. (*Id.* ¶¶ 40-42, 44-46, 51.)

1 Plaintiff's allegations are based in large part on the analysis performed by his counsel's
2 computer forensic expert prior to the filing of this Action. (*Id.* ¶ 49.) In particular, the expert ran a
3 series of diagnostic tests on the Software in a controlled environment and ultimately concluded that it
4 was designed to invariably report the existence of numerous purported "errors," to characterize
5 harmless files as "High Priority" problems, and to display the overall "System Health", "Privacy
6 Health" and "Disk Health" of a computer as "LOW"—regardless of the computer's actual "health"
7 or functionality. (*Id.* ¶ 52.) At all times, Defendants have disputed and continue to dispute these
8 findings.

9 **B. After Initial Discussions and Mediation, the Parties Proceed with the**
10 **Litigation.**

11 Prior to the Action being filed, the Parties held an initial meeting (through counsel) during
12 which Class Counsel presented their expert's conclusions about the Software Products and their
13 underlying methodologies, and the Parties otherwise discussed their respective views of the case.
14 (See Declaration of Rafey S. Balabanian [cited as "Balabanian Decl."] ¶ 3, attached as Exhibit 3.)
15 Based on those discussions, they agreed that there was at least some potential for an early
16 resolution of the case and therefore, proceeded with an all-day mediation before Judge Ronald M.
17 Sabraw (ret.) of JAMS on January 3, 2012. (*Id.*) At the end of the day though, the Parties were
18 unable to reach a resolution and determined to proceed with the litigation. (*Id.*)⁶

19 Gross filed his original complaint on January 10, 2012, alleging claims solely against
20 Defendant Symantec. (Dkt. 1.) Symantec moved to dismiss the complaint (Dkt. 28), and in lieu of
21 filing an opposition, Plaintiff filed his first amended complaint and named Symantec's wholly
22 owned subsidiary, PC Tools Ltd., as an additional party-defendant. (Dkts. 32-33.) Thereafter,
23 Symantec filed another 12(b)(6) motion to dismiss arguing, *inter alia*, that it was not a proper
24 party to the Action, that Plaintiff had failed to properly plead his claims under California law, and

6 At all times, Defendants have denied and continue to deny any and all wrongdoing. (See
26 Settlement Agreement § III.) Nonetheless, Defendants have entered into the Settlement
27 Agreement, determining that continued litigation would be risky, burdensome, and costly.
Defendants thus agree that the immediate resolution of these claims and release from future claims
(as defined in the Settlement Agreement) are desirable and beneficial. (*Id.*)

1 that he had also failed to plead fraud under the heightened pleading standard of Fed. R. Civ. P.
 2 9(b). (Dkt. 38.) After full briefing by the Parties, on July 31, 2012, the Court granted Symantec's
 3 motion to dismiss the amended complaint, but gave Plaintiff leave to plead additional factual
 4 information to support his claims. (Dkt. 49.) Plaintiff ultimately filed his Second Amended
 5 Complaint per the Court's Order (Dkt. 50) and in response, Symantec filed its third motion to
 6 dismiss. (Dkt. 51.)⁷

7 As briefing on Symantec's several motions to dismiss proceeded, Plaintiff also served and
 8 Symantec responded to written discovery requests. (Balabanian Decl. ¶ 5.) Thereafter, the Parties
 9 exchanged correspondence and met and conferred regarding Plaintiff's perceived deficiencies in
 10 those responses, and whether discovery-related motion practice was necessary. (*Id.*) In the end, the
 11 Parties worked through the issues without resorting to Court-intervention, and eventually reached
 12 the instant settlement, which mooted their discovery disputes.

13 **C. The Parties Kept the Lines of Communication Open, Which Led to a Second
 14 Mediation and Settlement.**

15 Throughout the litigation, the Parties also kept the lines of communication open and
 16 eventually, as a result of their formal discovery, informal exchanges of information and additional
 17 discussions, believed that they had each obtained enough information to appropriately evaluate their
 18 respective claims and defenses and make resolution a real possibility. (*Id.* ¶ 6.) Accordingly, they
 19 agreed to proceed with a second mediation before third-party neutral John B. Bates of JAMS (San
 20 Francisco) on November 12, 2012. (*Id.*) With the assistance of Mr. Bates, the Parties were able to
 21 reach an agreement in principle as to the primary terms of a class-wide settlement. (*Id.*) After three
 22 months of additional negotiation to finalize the ancillary terms of the settlement, the Parties
 23 reduced their Agreement to writing in the form of their Stipulation of Class Action Settlement (the
 24 "Agreement") now before the Court. (*Id.*)⁸

25
 26 ⁷ Although that motion has now been fully briefed, no argument has been heard and no
 27 ruling has been issued by the Court in light of the instant settlement. (Dkts. 52, 54.)

28 ⁸ As previously explained, it was only after the Parties agreed upon the Settlement Benefits
 29 to the Class that they negotiated and reached agreement on the amount of Class Counsel's Fee

1 **D. The Court Grants Preliminary Approval of the Proposed Settlement.**

2 Plaintiff moved for preliminary approval of the settlement on March 15, 2013, and the Parties
 3 appeared before the Court for the preliminary approval hearing on April 19th. (Dkt. 67.) At the
 4 hearing, the Court found that the Agreement was within the range of possible approval in terms of the
 5 Settlement Benefits to the Class, the Notice Plan, and the negotiations leading to the Agreement. (Dkt.
 6 70 at 2.) But, before granting preliminary approval, the Court requested that the Parties prepare an
 7 appropriate addendum to the Agreement allowing it the discretion to designate for *cy pres* distribution
 8 a portion of the Settlement Fund equal to or less than the difference between the maximum allowable
 9 Fee Award contemplated by the Agreement and the actual Fee Award ultimately granted by the Court
 10 (in the event that it is less than that amount). (Dkt. 68-1 at 2.) Having no objections to the Court's
 11 proposal and per its instructions, the Parties negotiated and executed an Addendum to their Agreement
 12 implementing the potential *cy pres* component and presented it to the Court for consideration. (Dkt.
 13 68-1.) Thereafter, on May 28th, the Court granted preliminary approval of the Settlement, and set a
 14 Final Approval Hearing for October 4, 2013. (Dkt. 70.)

15 Following preliminary approval and as explained further *infra*, the Parties have since
 16 implemented the Court-approved Notice Plan through the Settlement Administrator and received an
 17 overwhelmingly favorable response from the Settlement Class. On August 6th, the Parties also jointly
 18 submitted to the Court their respective *cy pres* proposals⁹ and Plaintiff filed his motion for attorneys'
 19 fees, costs, and an incentive award, all of which are currently pending before the Court. (Dkts. 71,
 20 72.)¹⁰

21 Award and an incentive award to Plaintiff as Class Representative, both of which are obviously
 22 subject to Court approval. (Balabanian Decl. ¶ 6 n.2.)

23 ⁹ The same procedure was used in the *LaGarde, et al. v. Support.com, et al.* matter and the
 24 court there ultimately determined that a *cy pres* distribution in the amount of \$200,000.00, which
 25 is the number that plaintiffs' counsel proposed, was appropriate. No. 3:12-cv-00609-JSC, Dkt. 61
 at 7. Class Counsel believes that a *cy pres* distribution in that amount would be appropriate in this
 case as well. (Balabanian Decl. ¶ 8 n.3.)

26 ¹⁰ Less than twenty-four hours after their submission to the Court, both Plaintiff's motion for
 27 attorneys' fees and an incentive award, and the Parties' *cy pres* proposals, were posted to
 28 Settlement Website for review by the Settlement Class, which was two-weeks prior to the deadline
 for opt-outs and objections. (Balabanian Decl. ¶ 8 n.4.)

1 **III. TERMS OF THE SETTLEMENT**

2 The terms of the Parties' settlement are summarized as follows:

3 **A. Class Definition:** The Settlement Class includes all individuals and entities in the
4 United States and its territories that, prior to May 28, 2013, purchased any of the following
5 software: PC Tools Registry Mechanic and PC Tools Performance Toolkit released since June 1,
6 2007, and Norton Utilities 14.0 through 16.0. (Settlement Agreement § II.)

7 **B. Prospective Relief:**

8 **1. Improvements to the Software Products:** Symantec and PC Tools have
9 agreed to modify the current versions of their respective Software Products to: (i) deactivate the
10 "System Health" meter within the main Graphical User Interface ("GUI") so that a user's System
11 Health is reported as "unknown" until after the individual performs a diagnostic scan, (ii) refrain
12 from claiming that an upgrade to the full versions of the Software will "speed" up or make
13 computers run "faster", (iii) eliminate representations within the Software that any specific errors
14 require "immediate repair", (iv) stop characterizing invalid registry entries as "errors", and (v)
15 include documentation within the Software's GUI "Help" section that clearly explains the
16 detection and reporting methodologies of the Software's diagnostic scans. (*Id.* § VI.A.)

17 **2. New Documentation Explaining the Software Products' Functionality:**

18 Defendants have further agreed to create and publish new documentation to be associated with the
19 modified versions of the Software explaining in a clear and concise manner (i) the "System
20 Health" meter and the factors considered in determining a computer's "System Health", and (ii)
21 the potential harm that the issues detected by the Products might pose to a computer's operations,
22 including what is meant by a "High Priority" issue. (*Id.* § VI.B.)

23 **C. Monetary Relief:** Defendants have agreed to create a non-segregated Settlement
24 Fund in the amount of \$11 million, from which payments for all Notice and Administrative
25 Expenses, the Fee Award, an Incentive Award to Plaintiff as Class Representative, payments for
26 valid Settlement Class Member claims, and any *cy pres* distribution will be paid.

27 Each Settlement Class Member that submits a valid Claim Form will be entitled to receive
28 a one-time payment of \$9.00. (*Id.* § VI.C.2.) In the event that the amount in the Settlement Fund is

1 not sufficient to pay in full all valid Settlement Class Member claims, Notice and Administration
 2 Expenses, and the full amount of the Incentive Award and the Fee Award, the Settlement
 3 Administrator shall make payments to Settlement Class Members on a *pro rata* basis. (*Id.*)

4 **D. Other Relief:** In addition to the individual and prospective relief described above,
 5 Defendants have agreed to the following relief.

6 **1. Anti-Virus Software:** Each Settlement Class Member will be entitled to
 7 receive three (3) months of free access to Symantec's Norton Antivirus software. (*Id.* § VI.C.3.)

8 **2. Payment of Notice and Administrative Expenses:** Defendants shall pay all
 9 Notice and Administration Expenses up to \$150,000.00. (*Id.* §§ II, VI.C.) Any overage will be
 10 paid one half by Defendants and one half by Class Counsel. (*Id.* § VII.C.)

11 **3. Compensation for the Class Representative:** Defendants have agreed to
 12 pay, from the Settlement Fund and subject to Court approval, an Incentive Award to Plaintiff as
 13 Class Representative up to an amount of \$2,500. (*Id.* § XI.A.)

14 **4. Payment of Attorneys' Fees and Expenses:** Defendants have agreed not to
 15 oppose Class Counsel's application for a Fee Award up to an amount of \$1.65 million, subject to
 16 Court approval. The Fee Award shall include all attorneys' fees and reimbursement of expenses
 17 associated with this Action. (*Id.* § XI.B; *see also* Dkt. 71.)

18 **5. Cy Pres Distribution:** The Parties have agreed that the Court may, in its
 19 discretion, distribute a portion of the Settlement fund equal to or less than the difference between
 20 the maximum allowable Fee Award contemplated by the Agreement and the actual Fee Award
 21 granted by the Court (in the event that it is less than the maximum) to *cy pres*. (*See* Dkt. 68-1.) Plaintiff
 22 has proposed (i) The U.C. Berkeley Center for Law and Technology, (ii) The Rose Foundation, and
 23 (iii) Consumer Watchdog as potential *cy pres* recipients. (Dkt. 72.) Defendants have proposed (i)
 24 National Cyber Security Alliance, (ii) Girls STEM Network Cybersecurity, and (iii) Common Sense
 25 Media as potential *cy pres* recipients.

26 **E. Release:** Upon the entry of Judgment, and in consideration of the Settlement
 27 Benefits, each Settlement Class Member shall be deemed to have released Defendants and each of
 28 the Released Parties from any and all "Released Claims." (Settlement Agreement § V.)

1 **IV. NOTICE WAS DISSEMINATED TO THE CLASS, SATISFYING DUE PROCESS.**

2 Notice to settlement class members is sufficient for purposes of approving a class settlement
 3 where the manner of notice is the best “practicable under the circumstances . . .” Fed. R. Civ. P.
 4 23(c)(2)(B); *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The “best notice
 5 practicable” includes individual notice “to all members who can be identified through reasonable
 6 effort.” Fed. R. Civ. P. 23(c)(2). Actual receipt of notice by all members of a class is not required to
 7 comport with the Rule 23 or due process requirements. Instead, the Federal Judicial Center has
 8 concluded that a notice plan that reaches at least 70% of the class is reasonable. *Federal Judicial
 9 Center, Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide*
 10 (2010), p. 3, available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf)
 11 (last visited August 3, 2013).

12 Here, the Court-approved Notice Plan included direct notice via email to the last known
 13 email address of each Settlement Class member (provided during their purchase of the Software
 14 Products), publication of the Settlement Website,¹¹ which itself allows uninterrupted access to
 15 important case documents like the Court’s Preliminary Approval Order, the Parties’ Settlement
 16 Agreement, the Notice, and a downloadable Claim Form, and provided for the submission of Class
 17 member claims online,¹² and CAFA notice to the relevant governmental agencies. Additionally, the
 18 Settlement Administrator established and operated a toll-free telephone line (that remains active to
 19 this day) through which Class members could call to obtain information about the settlement,
 20
 21
 22

23 ¹¹ The Agreement contemplates that the Settlement Website—www.gross-settlement.com—
 24 which went live on June 18, 2013, will remain active until after final approval has been granted,
 the appeals period has run, and all Class member claims have been paid. (See Declaration of
 25 Mallory Sander [cited as “Sander Decl.”] ¶ 19, attached as Exhibit 4.)

26 ¹² As the Court knows well, the Notice provided to the Settlement Class was also neutral in
 tone and provided Class Members with a detailed explanation of their rights under the settlement,
 including how to obtain the available Settlement Benefits, how to “opt-out” of the settlement, and
 how to comment in support of or in opposition to it. (See Sander Decl., ¶¶ 3-5, 8.) This information
 gave Settlement Class Members the ability to make an informed decision about their participation
 (or not) in the settlement.

1 request copies of the Notice and Claim Form, and receive assistance with submitting claims.¹³

2 (Sander Decl. ¶¶ 4, 19.)

3 Since the Court granted preliminary approval, the Parties have successfully implemented the
 4 approved Notice Plan through the Settlement Administrator. The Settlement Administrator has
 5 transmitted more than 1 million notice e-mails, which were successfully delivered to more than 83%
 6 of the Settlement Class, far surpassing the requisite 70% deliverability rate.¹⁴ (See Sander Decl.
 7 ¶¶ 12-15). Immediately upon the Notice being distributed, Class members began submitting Claim
 8 Forms—both online through the Settlement Website and by mail. In total, the Settlement
 9 Administrator has received just shy of 2,000 Claim Forms and because the window to submit claims
 10 will remain open for an additional thirteen (13) days until September 19th, expects to receive still
 11 more. (*Id.* ¶ 18.) By contrast, the window for Settlement Class Members to request exclusion or object
 12 to the settlement has now closed, and not a single Class Member has raised an objection and only six
 13 have requested exclusion. (*Id.* ¶¶ 16-17.) From this overwhelmingly favorable response, it is evident
 14 that the Settlement Class is satisfied with the results of the settlement.

15 It bears noting that the success of the e-mail notice was due, in large part, to the multi-step
 16 approach Settlement Administrator Epiq Systems implemented here. First, Epiq confirmed that there
 17 were no duplicate e-mails on the list of Settlement Class Members to whom the Notice would be
 18 sent. (*Id.* ¶ 6.) Then, it ensured that the “From” display and address fields, and subject line included
 19 terms that could easily be recognized by Class Members. (*Id.* ¶¶ 7, 9.) Each email also contained an
 20 opt-out option so Class Members could prevent the receipt of future mailings. (*Id.* ¶ 8.) And, both a
 21 text and HTML version of the e-mail notice were sent simultaneously in batches of 50,000—
 22

23 ¹³ Class Members were also able to submit paper Claim Forms to the Settlement Administrator
 24 by mail and many Class Members, in fact, did so. (Sander Decl. ¶ 18.)

25 ¹⁴ A rate of 70-95% deliverable class notice is considered “high.” *See, e.g., Federal Judicial*
 26 *Center, Class Action Notice* (2010); *see also Hartless v. Clorox, Co.*, 273 F.R.D. 630 (S.D. Cal. 2011)
 27 (finally approving a settlement with notice estimated to reach 75-83% of class members); *McCubrey*
 28 *v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 74 (N.D. Cal. 1976) (discussing adequate notice
 for large class actions) (citing *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975)
 (approving of a settlement without indirect notice and in which direct mail notice failed to reach
 “approximately one-third of the class”)).

1 measures that have been proven to increase e-mail deliverability. (*Id.* ¶¶ 10-11.) After the initial
 2 round of e-mail Notice was sent, Epiq also employed safeguards to identify undeliverable e-mails
 3 and took steps to resend them, including identifying “soft” bounce-backs and monitoring an e-mail
 4 inbox to respond to “captcha” and other requests to be completed before an e-mail could be
 5 successfully delivered. (*Id.* ¶¶ 13-15.)

6 Given the foregoing, it should be clear that notice of the settlement has been disseminated to
 7 the Settlement Class by the best methods practicable and due process satisfied.

8 **V. THE SETTLEMENT WARRANTS FINAL APPROVAL BECAUSE IT IS FAIR,
 9 ADEQUATE, AND REASONABLE.**

10 Not only has the Notice Plan met the rigors of Rule 23 and due process, but the settlement
 11 itself is also fair, reasonable and adequate and thus, warrants final approval. *See Officers for Justice*
 12 *v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), *cert.*
 13 *denied*, 459 U.S. 1217 (1983)). To determine whether a settlement is fair, adequate, and reasonable,
 14 courts in the Ninth Circuit typically evaluate it based upon the following non-exclusive list of
 15 factors:

16 “(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely
 17 duration of further litigation; (3) the risk of maintaining class action status throughout
 18 the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
 and the stage of the proceedings; (6) the experience and views of counsel; (7) the
 presence of a governmental participant; and (8) the reaction of the class members to
 the proposed settlement.”

19 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon v. Chrysler*
 20 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). No one factor controls, and the “importance to be
 21 attached to [each] will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief
 22 sought, and the unique facts and circumstances presented by each individual case.” *Officers for*
 23 *Justice*, 688 F.2d at 625.

24 Moreover, in complex class action litigation like this, judicial policy favors settlement.
 25 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Accordingly, deference is
 26 often given “to the private consensual decision of the parties.” *Garner v. State Farm Mut. Auto. Ins.*
 27 *Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *8 (N.D. Cal. Apr. 22, 2010) (quoting

1 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (“We put a good deal of stock in
 2 the product of an arms-length, non-collusive, negotiated resolution”). Courts in the Ninth
 3 Circuit afford settlements such a presumption of fairness if: “(1) the negotiations occurred at arm’s
 4 length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in
 5 similar litigation; and (4) only a small fraction of the class objected.” *Romero v. Producers Dairy*
 6 *Foods, Inc.*, No. 05-cv-0484, 2007 WL 3492841, at *2 (E.D. Cal. Nov. 14, 2007). Each of these
 7 factors is satisfied here.

8 Indeed, the Parties’ settlement was the result of many months of discussions amongst
 9 experienced counsel, negotiations and two separate private mediation sessions before well-respected
 10 third-party neutrals. Those negotiations and mediation took place only after the Parties had sufficient
 11 information—gathered through both formal and informal discovery—about their respective claims
 12 and defenses, and the contours of the proposed Settlement Class. That, taken with the fact that not a
 13 single Class Member has raised an objection to the settlement—but thousands have submitted Claim
 14 Forms under its terms—strongly suggests that the settlement is fair and reasonable and that a
 15 presumption of fairness should attach. But even if such a presumption wasn’t appropriate (it is), as
 16 explained further below, each of the eight factors this Court should typically consider in determining
 17 the fairness, adequacy, and reasonableness of the settlement weighs strongly in favor of granting it
 18 final approval.

19 **A. Final Approval is Appropriate in Light of the Risks of Further Litigation.**

20 In determining whether a settlement is fair, adequate, and reasonable, courts first evaluate the
 21 strength of the plaintiff’s case and range of possible recovery in light of the risks of continued
 22 litigation. *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at *5 (S.D.
 23 Cal. Nov. 5, 2012); *see also In re Omnivision*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (citing
 24 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)). Under this analysis, the court
 25 balances “the vagaries of litigation and [] the significance of immediate recovery by way of the
 26 compromise to the mere possibility of relief in the future, after protracted and expensive litigation.”
 27 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004); *see also*
 28 *Protective Comm. for Indep. Stockholders v. Anderson*, 390 U.S. 414, 424–25 (1968) (“Basic to

1 [analyzing a proposed settlement] in every instance, of course, is the need to compare the terms of
 2 the compromise with the likely rewards of litigation.”). Assessing a plaintiff’s probability of success
 3 does not require a rigid formula or an ultimate conclusion on the merits. *Garner*, 2010 WL 1687832,
 4 at *9 (citing *Rodriguez*, 563 F.3d at 965; *Officers for Justice*, 688 F.2d at 625). Rather, “the Court’s
 5 assessment of the likelihood of success is . . . an amalgam of delicate balancing, gross
 6 approximations and rough justice.” *Garner*, 2010 WL 1687832, at *9 (citing *Officers for Justice*,
 7 688 F.2d at 625). “[T]he Court may presume that through negotiation, the Parties, counsel, and
 8 mediator arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of
 9 recovery.” *Garner*, 2010 WL 1687832, at *9 (citing *Rodriguez*, 563 F.3d at 965).

10 On balance, these factors weigh in favor of final approval of the settlement. Although
 11 Plaintiff and Class Counsel are confident in the strength of their claims, there was a significant
 12 risk that ongoing litigation would result in a diminished recovery for the Class (or no recovery at
 13 all). That is, from the outset of the litigation, Defendants and their counsel have raised vigorous
 14 arguments against the claims at issue, including numerous legal challenges that could have
 15 reduced or eliminated their liability—for example, that Symantec could not be held vicariously
 16 liable for the design and marketing practices of PC Tools. (Balabanian Decl. ¶ 9.) Recovery would
 17 have also ultimately turned on the resolution of several complicated factual issues regarding the
 18 underlying source code, design and functionality of the Software Products, which would have
 19 been expensive and time consuming, requiring additional discovery, expert testing and analysis.
 20 (*Id.*) And, even if Plaintiff was successful in overcoming those challenges, given the amount at
 21 stake and their reputational interests, Defendants were likely to appeal any decision on the merits,
 22 thereby delaying (and making uncertain) any recovery for the Class. (*Id.*) These significant risks—
 23 weighed against the certainty of relief obtained for the Class through the Settlement—suggest that
 24 the Settlement is more than fair, reasonable and adequate.

25 Indeed, the \$11 million Settlement Fund is sufficient in size to compensate Class Members
 26 for the damages they allegedly suffered by overpaying for the Software Products. (*Id.*) In
 27 addition, the Fund covers the costs of notice and administration (Settlement Agreement §§ II,
 28 VI.C), attorneys’ fees (*Id.* § XI.B), an incentive award to Plaintiff as Class Representative (*Id.*

1 § XI.A), and any *cy pres* distribution the Court may deem appropriate. (Dkt. 64.) The individual
 2 \$9 payments to Class Members who submit valid claims are similarly sufficient inasmuch as they
 3 represent a near complete recovery on Plaintiff's theory that they overpaid for the Software. (*Id.* §
 4 VI.C.2.)¹⁵

5 The non-monetary relief the Settlement provides is equally meaningful and was a primary
 6 goal of the litigation. Defendants have agreed to modify the Software Products so that they will no
 7 longer mislead consumers to believe that their computers are in imminent danger, that immediate
 8 repair is necessary, or that the Products can resolve such issues while also improving their
 9 computers' overall speed and performance. (Settlement Agreement § VI.A.) Instead, the Software
 10 will now give a more accurate assessment—in laymen's terms—of the health and actual system
 11 statuses of users' computers, and provide additional documentation that explains the Software
 12 Products' functionality, how the Products diagnose a particular system, and the potential harm to
 13 the system by the errors and threats detected. (*Id.* § VI.B.)

14 Finally, the Settlement provides each Class Member three months of free access to
 15 Symantec's Norton Antivirus software, regardless of whether they submit a Claim Form under the
 16 settlement. (Settlement Agreement § VI.C.3.) Because this antivirus software retails for \$24.99-
 17 \$49.99 per year, this component of the settlement amounts to an additional \$6-\$12 of value to each
 18 Settlement Class Member, and more than \$6-\$12 million to the Class as a whole.¹⁶

19 With all that in mind, it should be clear that the first and second factors to be considered
 20 here weigh in favor of granting final approval to the settlement.

21
 22 ¹⁵ Because Plaintiff does not allege that the Software Products were without any value
 23 whatsoever, Class Counsel's analysis suggests that the deceptive design at issue in this case
 24 resulted in a proportional reduction in the value of the Software. (Balabanian Decl. ¶ 9 n.5.)
 25 Therefore, a return of \$9 for each Software purchase represents a 30% return on the difference
 26 between the Software's alleged actual value and the approximately \$30 average purchase price.
 27 (*Id.*)

28 ¹⁶ Notably, this in-kind benefit is a significant increase in the amount of relief provided to the
 29 Class relative to the other settlements in the industry, which did not include such a component but
 30 nevertheless were found to be fair, reasonable and adequate, and were granted final approval by
 31 the federal and state courts that considered them. *See, e.g., Ledet*, No. 2:11-CV-295-PBT;
Drymon, No. 11-CH-16779; *Webb*, No. 1:11-cv-04141.

B. The Risks Involved in Maintaining Class Action Status Render Final Approval Appropriate.

2 The risk in maintaining this case as a class action through trial and any appeals also weighs
3 in favor of granting final approval to the settlement. *See Officers for Justice*, 688 F.2d at 625. This
4 factor does not require a plaintiff to have moved for class certification as long as pre-certification
5 concerns outweigh the risks both parties face should a plaintiff succeed or fail in certifying the class.
6 *See Gardner v. GC Servs., LP*, No. 10-CV-0997-IEG CAB, 2012 WL 1119534, at *4 (S.D. Cal.
7 Apr. 2, 2012) (recognizing the risk class certification poses for both parties and acknowledging the
8 benefits of settlement).

9 Given the uniform nature of Defendants' alleged design and marketing practices, Plaintiff
10 and Class Counsel are confident that this case is appropriate for certification. For example,
11 Defendants' uniform conduct toward the members of the Class raises several common (and
12 predominant) issues of fact and law, including: (i) whether Defendants intentionally designed the
13 Software to falsely report the existence of errors; (ii) whether the Software exaggerates the
14 severity of errors detected on users' computers; (iii) whether Defendants intentionally designed the
15 Software and its respective marketing materials to deceive consumers into purchasing the
16 Products; (iv) whether Plaintiff and the Settlement Class overpaid for the Software Products; and (v)
17 whether those common factual issues—if proven—support Defendants' liability for claims under
18 California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, fraudulent
19 inducement, breach of express warranties, breach of contract, and breach of the implied covenant
20 of good faith and fair dealing. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 2556
21 (2011) (explaining that commonality is found where the claims of all class members “depend upon a
22 common contention,” and “even a single common question will do”).

23 Despite the several common questions of law and fact in this case, adversarial class
24 certification is not a forgone conclusion. Instead, Defendants are likely to argue that the Software
25 had at least some utility—which Plaintiff already concedes—and raise potential individual issues
26 that could make certification inappropriate—*e.g.*, variations in the conditions of users’ computers
27 and the effects that these variations may have on the Software’s performance. For Plaintiff, failure to
28 certify the Class would mean an immediate end to the Class’s claims here and a total lack of

1 recovery. On the other side of the coin, a loss at the certification stage would pose severe
 2 consequences for the remainder of the litigation—*e.g.*, increasing Defendants’ potential liability.

3 Thus, given the risks to all Parties relating to maintaining class certification through the end
 4 of the case, the Court should find that this factor also weighs in favor of final approval.

5 **C. The Settlement Offers an Appropriate Amount of Monetary and Prospective
 6 Relief.**

7 The fourth factor—the amount and nature of the relief offered under the settlement—also
 8 weighs in favor of final approval. In this regard, courts should consider “the complete package” of a
 9 settlement rather than individual terms. *Officers for Justice*, 688 F.2d at 628. When evaluating this
 10 factor, courts defer “to the private consensual decision of the parties.” *Rodriguez*, 563 F.3d at 965
 11 (citing *Hanlon*, 150 F.3d at 1027) (noting that courts “put a good deal of stock” in the agreement
 12 reached by the parties where the settlement is the result of “an arm’s-length, non-collusive,
 13 negotiated resolution.”); *see also Officers for Justice*, 688 F.2d at 628 (holding that even obtaining
 14 through settlement a fraction of the ultimate potential recovery can be fair, reasonable and adequate.)

15 In this case, the negotiated relief under the Settlement is more than fair and represents a near
 16 complete recovery for the Settlement Class. That is, each Class Member may claim a cash payment
 17 of \$9—approximately 30% of the average purchase price of the Software—from the \$11 million
 18 Settlement Fund. (Settlement Agreement § VI.C.2.) Regardless of whether he or she submits a
 19 claim, each Class Member will also receive a substantial in-kind benefit in the form of access to
 20 three free months of Symantec’s award winning Norton Anitvirus software—valued at
 21 approximately \$6-\$12 per Class Member, or more than \$6-\$12 million total. (*Id.* § VI.C.3.) Finally,
 22 in addition to the monetary and in-kind benefits, Defendants have also agreed to multi-pronged
 23 prospective relief that will modify the Software Products to provide additional clarity as to their
 24 functions and the results they generate on users’ computers, and include within the Software
 25 additional documentation explaining those processes and the threats posed by the errors and
 26 problems actually affecting users’ machines. (*Id.* §§ VI.A, VI.B.)

27 Accordingly, the amount and nature of the relief provided to the Settlement Class also
 28 weighs in favor of final approval.

D. The Settlement is a Product of Significant Discovery and a Well-Developed Factual Record.

Final approval of the settlement should also be granted because it's based upon a solid factual record developed through both formal and informal discovery, and Class Counsel's experience in analogous litigation. *See OmniVision*, 559 F. Supp. 2d at 1042 (citing *In re Mego*, 213 F. 3d at 459)). Even if that wasn't the case (it is), it is well settled that where parties "have sufficient information to make an informed decision about settlement, formal discovery is not a necessary ticket to the bargaining table." *Gardner*, 2012 WL 1119534, at *5 (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)) (internal quotations omitted). Ultimately, settling parties need only reach a point in the litigation where they understand the respective strengths and weaknesses of their positions. *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *8 (S.D. Cal. Dec. 10, 2008) (quoting *In re Warner Comm'n's Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985)). A compromise based on such a thorough understanding of the legal and factual issues and a "genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms.*, 221 F.R.D. at 528 (citations omitted).

Throughout more than a year and a half of litigation, the Parties here have engaged in a significant amount of both formal discovery, informal informational exchanges and private discussions, negotiations and mediation—not to mention Class Counsel’s pre-suit investigation and the Parties’ briefing on several substantive motions aimed at testing the sufficiency of Plaintiff’s claims and several of Defendants’ potential defenses. (Balabanian Decl. ¶ 10; *see also* Dkts. 28, 38, 39, 40, 51, 52.) As a result of those efforts, the Parties have gathered the information necessary to properly evaluate their respective claims and defenses and ultimately, negotiate the settlement now before the Court. (Balabanian Decl. ¶ 11.) As recognized by the Court’s Preliminary Approval Order, the litigation to date and the information available to the Parties suggest that the settlement is a fair, reasonable and adequate result for the Settlement Class.

Accordingly, this factor weighs in favor of final approval as well.

E. The Experience and Views of Counsel Favor a Finding that the Settlement is Fair, Reasonable and Adequate.

2 Next, the Court should defer (at least in part) to the Settlement because it was reached by
3 experienced counsel who readily support its approval. Indeed, “[p]arties represented by competent
4 counsel are better positioned than courts to produce a settlement that fairly reflects each party’s
5 expected outcome in litigation.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *see*
6 *also OmniVision*, 559 F. Supp. 2d at 1043 (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622
7 (N.D. Cal. 1979)) “The recommendations of plaintiff’s counsel should be given a presumption of
8 reasonableness.” *Id.* And, that presumption of fairness is strengthened when (as here) counsel have
9 specific experience in the type of claims being litigated. *See Martin v. Ameripride Serv., Inc.*, No.
10 08-cv-440-MMA (JMA), 2011 WL 2313604, at *7 (S.D. Cal. June 9, 2011); *see also Nat’l Rural
11 Telcomms.*, 221 F.R.D. at 528 (“noting that ‘[g]reat weight’ is accorded to the recommendation of
12 counsel, who are most closely acquainted with the facts of the underlying litigation”).

13 Class Counsel here have significant experience litigating consumer class actions of similar
14 size, scope, and complexity, and have been appointed class counsel in numerous other class actions
15 by courts throughout the country. (See Edelson LLC Firm Resume, attached as Exhibit 3-A to the
16 Balabanian Decl.) Particularly relevant to this case, Class Counsel have developed a unique and
17 specific set of expertise while prosecuting more than a dozen similar nationwide class actions
18 related to claims against Defendants' industry competitors for their own alleged deceptive design
19 and marketing of utility software products. (Balabanian Decl. ¶ 11.) It was with that experience
20 that they investigated and analyzed Plaintiff's and the Class's claims, Defendants' potential
21 defenses, the formal and informal discovery produced by Defendants, and ultimately, negotiated
22 the Settlement now before the Court. With all of that in mind and faced with a formidable
23 opposition by defense counsel highly experienced in complex litigation from a prominent multi-
24 national law firm, Class Counsel is confident that the settlement is an exceptional result for the
25 Settlement Class. (*Id.*)

26 As such, this factor also weighs in favor of final approval of the Settlement.

F. The Presence of a Governmental Participant.

28 There were no “governmental coattails for the class to ride” in this case, *Rodriguez*, 563

1 F.3d at 964, but Defendants were nonetheless obligated to provide notice of the United States
 2 Attorney General and appropriate state officials as a condition of obtaining Court approval. 28
 3 U.S.C. § 1715; *Garner*, 2010 WL 1687832, at *14. “Although CAFA does not create an
 4 affirmative duty for either the state or federal officials to take any action in response to a class
 5 action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any
 6 concerns that they may have during the normal course of the class action settlement procedures.”
 7 *Garner*, 2010 WL 1687832, at *14. The Parties complied with CAFA’s notice requirement and
 8 provided the requisite notice on March 18, 2013 (Stipulation of Settlement) and May 21, 2013
 9 (Addendum to Settlement). (Dkts. 65, 69.) To date, no state or federal official has raised any
 10 objection to the settlement. Accordingly, this factor also supports final approval.

11 **G. The Reaction of Settlement Class Members.**

12 Perhaps most telling, the Settlement Class has had an overwhelmingly positive reaction to
 13 the Settlement. *Garner*, 2010 WL 1687832, at *14. As described above, more than 83% of the Class
 14 received direct notice of the Settlement, but not a single objection to the Settlement was raised, only
 15 six Class Members have sought exclusion, and thousands have already made claims for Settlement
 16 Benefits. *See id.* (“Courts have repeatedly recognized ‘that the absence of a large number of
 17 objections to a proposed class action settlement raises a strong presumption that the terms of a
 18 proposed class action settlement are favorable to the class members.’”) (quoting *Nat’l Rural
 19 Telecomm.*, 221 F.R.D. at 529)); *see also Churchill Vill.*, 361 F.3d at 577 (affirming the district
 20 court’s approval where 45 of 90,000 notified class members objected to the settlement and 500 class
 21 members opted out of the settlement); *In re Mego*, 213 F.3d at 459 (final approval granted in
 22 settlement with one objection out of a potential class of 5,400). Given the strength of the Notice Plan,
 23 combined with the complete lack of opposition to the Settlement, it’s clear that the members of the
 24 Class are aware of and have found the Settlement to be fair, reasonable and adequate to resolve their
 25 claims. *See In re AT & T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 349 (N.D. Ill.
 26 2010) (“silence [of a class] coupled with other indicia of fairness . . . provides further support of
 27 approval.”).

28 As such, this factor weighs heavily in favor of final approval.

H. The Absence of Collusion in Reaching the Settlement Precludes Additional Scrutiny and Favors Final Approval.

2 In addition to the other factors, where, as here, a settlement is reached prior to class
3 certification, courts often require a higher standard of fairness “to ensure class counsel and defendant
4 have not colluded in settling the case.” *Martin*, 2011 WL 2313604, at *5 (citing *Hanlon*, 150 F.3d at
5 1026). The factors most indicative of collusion between the parties are “(1) when counsel receives a
6 disproportionate distribution of the settlement, or when the class receives no monetary distribution
7 but class counsel are amply rewarded; (2) when the parties negotiate a ‘clear sailing’ arrangement
8 providing for the payment of attorneys’ fees separate and apart from class funds, which carries ‘the
9 potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for
10 counsel accepting an unfair settlement on behalf of the class’; and (3) when the parties arrange for
11 fees not awarded to revert to defendants rather than be added to the class fund.” *In re Bluetooth*
12 *Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (internal citations and quotations
13 omitted). None of these “warning signs” are present here.

14 First, Class Counsel is not receiving a disproportionate amount of the Settlement Fund.
15 Rather, the proposed Fee Award amounts to just 15% of the Settlement Fund and just over 9.7% of
16 the total cash and in-kind benefits combined.¹⁷ (See Dkt. 51.) These amounts fall well below the
17 Ninth Circuit’s benchmark of 25% in common fund cases, *In re Bluetooth*, 654 F.3d at 942, and
18 even further below the Ninth Circuit’s typical fee award of 30-50% in cases with a total recovery of
19 less than \$50 million. *See Martin*, 2011 WL 2313604, at *8. In addition, rather than seek attorneys’
20 fees separate and apart from funds paid to the Class, Class Counsel seeks the Fee Award as a
21 percentage of the total value created by the Settlement, further weighing in favor of a finding of
22 fairness and reasonableness. *See Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003); *In re*
23 *Bluetooth*, 654 F.3d at 948-49.

24 Second, while there is a reversion to Defendants, there is no reversion of attorneys' fees,
25 which is what the court *In re Bluetooth* warned against. 654 F.3d at 947. Instead, any portion of the

27 17 Plaintiff's request for the Fee Award does not, however, take into account the value of the prospective measures and modifications to Defendants' Software Products, even though those benefits are valuable as well.

1 requested attorneys' fees that is not awarded by the Court will remain in the Settlement Fund to pay
 2 for Class Member claims and the other costs of the settlement, and/or be distributed to appropriate
 3 *cy pres* recipients as directed by the Court. (Settlement Agreement § VI.C; *see also* Dkts. 68-1, 70.)
 4 Thus, any reversion to Defendants will be only after all such payments have been made.

5 Third, while there is a "clear sailing" fee provision in the Agreement, the Parties negotiated
 6 the proposed Fee Award only after relief to the Settlement Class had already been agreed upon.
 7 (Balabanian Decl. ¶ 6 n.2.) The maximum allowable Fee Award was thus negotiated in the context
 8 of knowing the actual value of the total Settlement Fund, with the Parties agreeing to a maximum
 9 allowable Fee Award that amounted to 15% of the total Settlement Fund. As such, this component
 10 of the Settlement should not cause concern, as the Ninth Circuit has only cautioned against approval
 11 in settlements where the requested fee is decided *independently* of the amount provided to the class,
 12 which is not the case here. *See In re Bluetooth*, 654 F.3d at 947.

13 Finally and most importantly, there was no collusion in this case. On this issue, the Court can
 14 look to the assurances of counsel and the presence of not one, but two neutral mediators, all of which
 15 "weigh[] in favor of a finding of non-collusiveness." *Id.* at 948. As explained above, despite keeping
 16 the lines of communication open and considering a potential early resolution of this matter, the
 17 instant settlement was reached only after more than a year of litigation and discovery, additional
 18 informal exchanges of information and several in-person meetings between counsel. (*See*
 19 Balabanian Decl. ¶¶ 3-6.) Even still, it took the assistance of two third-party neutrals—Judge Sabraw
 20 (ret.) and Mr. Bates, and two separate all-day mediation sessions to reach a settlement. (*Id.*) With
 21 this as the backdrop and considering the substantive terms of the Settlement, there should be no
 22 question that collusion is not a concern here. *See In re HP Laser Printer Litig.*, No. SACV 07-0667
 23 AG RNBX, 2011 WL 3861703, at *4 (C.D. Cal. Aug. 31, 2011).

24 Thus, this final factor is satisfied and the Court may properly grant final approval.

25 **VI. CONCLUSION**

26 For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order (i)
 27 granting final approval of the Parties' Settlement, (ii) dismissing all Released Claims with
 28 prejudice, and (iii) granting such other and further relief as the Court deems reasonable and just.

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Respectfully Submitted,

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JAMES GROSS, individually and on behalf of all
others similarly situated,

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Dated: September 6, 2013

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By: /s/ Rafey S. Balabanian

One of Plaintiff's Attorneys

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